

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of)	
)	
DELMARVA EDUCATIONAL ASSOCIATION	)	File No. BPED-19980320MJ
	)	Facility ID No. 90265
For a New FM Broadcast Station)	
at Cheriton, Virginia)	
)	
)	
COMMONWEALTH PUBLIC	)	File No. BPED-19980318MH
BROADCASTING CORPORATION	)	Facility ID No. 90292
)	
For a New FM Broadcast Station)	
at Heathsville, Virginia)	
)	
)	
AMERICAN FAMILY ASSOCIATION, INC.	)	File No. BPED-19980311MD
	)	Facility ID No. 90245
For a New FM Broadcast Station)	
at Cape Charles, Virginia)	
)	
)	
BROADCASTING FOR THE	)	File No. BPED-19980319MF
CHALLENGED, INC.	)	Facility ID No. 90288
)	
For a New FM Broadcast Station)	
at Cape Charles, Virginia)	
)	
)	
BY THE CAPE BROADCASTING, INC.	)	File No. BPED-19980320MN
	)	Facility ID No. 90280
For a New FM Broadcast Station)	
at Eastville, Virginia)	
)	
)	
HAMPTON ROADS EDUCATIONAL	)	File No. BPED-19971015MB
TELECOMMUNICATIONS ASSOCIATION, INC.	)	Facility ID No. 88716
)	
For a New FM Broadcast Station)	
at Mathews, Virginia)	
)	
)	
EDUCATIONAL MEDIA CORPORATION	)	File No. BPED-19970903MB
	)	Facility ID No. 88175
For a New FM Broadcast Station)	
at Cape Charles, Virginia)	

MARY V. HARRIS FOUNDATION)

For a New FM Broadcast Station)
at Belle Haven, Virginia)

File No. BPED-19980319MD
Facility ID No. 90278

STOCKTON CHRISTIAN LIFE COLLEGE, INC.)

For a New FM Broadcast Station)
at Cape Charles, Virginia)

File No. BPED-19980320MI
Facility ID No. 90264

and)

COMMONWEALTH PUBLIC)
BROADCASTING CORPORATION)

File No. BPED-19971202IB
Facility ID No. 10016

For a Modification to the Facilities of FM)
Broadcast Station WCVE-FM,)
Richmond, Virginia)

MEMORANDUM OPINION AND ORDER

Adopted: April 8, 2004

Released: April 13, 2004

By the Commission:

1. We have before us (1) a Joint Request for Approval of Agreement (“Joint Request”) filed August 6, 2002, by Delmarva Educational Association (“Delmarva”), American Family Association, Inc. (“AFA”), Broadcasting for the Challenged, Inc. (“BFC”), By the Cape Broadcasting, Inc. (“Cape”), Commonwealth Public Broadcasting Corporation (“CPBC”), Educational Media Corporation, Inc. (“EMC”), Hampton Roads Educational Telecommunications Association, Inc. (“HRETA”), Mary V. Harris Foundation, Inc. (“Harris”), and Stockton Christian Life College, Inc. (“Stockton”) (collectively the “Settling Parties”), seeking approval of a universal settlement of the Settling Parties’ mutually exclusive (“MX”) applications for new or modified noncommercial educational (“NCE”) FM broadcast stations; and (2) a Petition for Reconsideration filed August 13, 2002, by Stockton (“Stockton Petition”), in which Stockton seeks reconsideration of the Media Bureau’s (“Bureau”) August 9, 2002, dismissal of its application for a new FM NCE station at Cape Charles, Virginia.¹ These pleadings were filed with the Bureau. However, because we find the Bureau lacks delegated authority to address these issues, we will consider them in the first instance and, as discussed below, grant the Joint Request and the Stockton Petition.

¹ See *Public Notice*, “Noncommercial Educational FM and FM Translator Applications Dismissed for Failure to File Required Information,” 17 FCC Rcd 15706, 15707 (MB 2002).

2. **Background.** Settling Parties all filed mutually exclusive applications for NCE FM facilities, designated MX Group 970932. CPBC filed for a modification to its station WCVE-FM, Richmond, Virginia, and CPBC and the other Settling Parties filed applications for new NCE FM stations at other communities in Virginia. Under the terms of the Joint Request, Delmarva and CPBC would amend their applications for new NCE FM stations at, respectively, Cheriton and Heathsville, Virginia, and those applications would be granted along with CPBC's modification application for WCVE-FM. The applications of AFA, BFC, Cape, EMC, HRETA, Harris, and Stockton would be dismissed. Stockton requests its application be reinstated for the sole purpose of participating in the settlement, but pursuant to the settlement it would then be dismissed.

3. In *Reexamination of the Comparative Standards for Noncommercial Educational Applicants* ("NCE R&O"),² the Commission adopted new procedures for selecting among mutually exclusive applicants for NCE stations. The new procedures involve both evaluations under Section 307(b) of the Communications Act of 1934,³ and a "point system" under which applicants are awarded points for being an established local applicant, demonstrating local diversity of ownership, being part of a state-wide network, and covering the largest population and geographic area of the mutually exclusive applicants.⁴ Applicants were directed to file point supplements to their pending applications, in which they would claim Section 307(b) preferences, if applicable, and list the number of points to which they were entitled.

4. In the *NCE MO&O*, in order to facilitate universal settlements among existing groups of mutually exclusive applicants, the Commission directed the Bureau, until the point supplement filing deadline, to waive the provision of Section 73.3525(a)(3) of our Rules precluding the receipt of any money or other consideration in excess of legitimate and prudent expenses in exchange for dismissal of an application.⁵ Thus, during this limited time period, the Bureau would accept settlements that resolved the claims of all applications within a mutually exclusive group, in which consideration paid to the withdrawing applicants exceeded the expense limitations in the rule.⁶ The deadline for filing point supplements, and the period during which the expense limitations on settlements were waived, were announced and extended in *Public Notices* released by the Bureau.⁷

5. By the extended point supplement deadline, July 19, 2001, all of the Settling Parties except Stockton had filed point supplements. No settlement among the applicants in MX Group 970932 was filed by this deadline. As evidenced by the attachments to the Joint Request, all of the Settling Parties except EMC executed settlement agreements with Delmarva between May 24, 2001, and July 19,

² 15 FCC Rcd 7386 (2000), *clarified on reconsideration*, 16 FCC Rcd 5074 (2001) ("*NCE MO&O*"), *reconsideration denied*, 17 FCC Rcd 13132 (2002), *appeal docketed*, *American Family Association v. F.C.C.*, No. 00-1310 (D.C. Cir. July 14, 2000) (subsequent history concerning non-reserved spectrum omitted).

³ 47 U.S.C. § 307(b).

⁴ See 47 C.F.R. § 73.7003.

⁵ *NCE MO&O*, 16 FCC Rcd at 5107-08.

⁶ *Id.*

⁷ *Public Notice*, "Supplements and Settlements to Pending Closed Groups of Noncommercial Educational Broadcast Applicants Due By June 4, 2001," 16 FCC Rcd 6893 (MMB 2001) ("Settlement Public Notice"); *Public Notice*, "Deadline for NCE Settlements and Supplements Extended to July 19, 2001; Date for Calculating Comparative Qualifications Remains June 4, 2001," 16 FCC Rcd 10892, 10893 (MMB 2001) ("Extension Public Notice").

2001. EMC and Delmarva executed a settlement agreement July 9, 2002. The Joint Request was filed with the Commission on August 6, 2002.

6. **Discussion.** *Joint Request:* The Settling Parties request that we waive the provisions of Section 73.3525(a) of the Rules, allowing a settlement in which Delmarva may pay the Settling Parties consideration in excess of their legitimate and prudent expenses. Additionally, CPBC requests grant of its modification application for WCVE-FM, Richmond, Virginia. In return, Delmarva and CPBC will amend their applications for new NCE FM stations at, respectively, Cheriton and Heathsville, Virginia, so that the applications may be granted. AFA, BFC, Cape, EMC, HRETA, Harris, and Stockton will dismiss their applications. Settling Parties argue that the public interest is best served by the arrangement set forth in the Joint Request, as it permits grant of two new station applications and an upgrade to an existing station, rather than grant of only one application if the mutually exclusive applications were processed under the NCE point system.

7. While the Joint Request was originally addressed to the Bureau, the Bureau lacks delegated authority to waive Section 73.3525(a) in this instance.⁸ In the *NCE MO&O*, the Commission instructed the Bureau to waive the expense reimbursement limitations of Section 73.3525(a)(3), but expressly limited that authority to settlements submitted on or before the last date for filing point supplements, July 19, 2001.⁹ We thus consider the Joint Request in the first instance.

8. We believe in this case that waiver is appropriate. We are aware that the settlement was filed many months after the Bureau-announced deadline, and that the Bureau stated that any settlements reached after that deadline would be subject to the provisions of Section 73.3525. However, several factors convince us that waiver of the expense reimbursement limitations in this instance would be in the public interest.¹⁰ First, the proposed settlement would provide for grant of two new NCE FM services and improvements to an existing service, whereas application of the NCE point system would result in only one grant. Moreover, grant of the Joint Request will enable new and improved NCE FM service to be introduced more rapidly than would be the case if we were to proceed with the point system after pending court challenges have been ultimately resolved.¹¹ Second, waiver of the expense reimbursement limitation does not undermine the purpose of the limited settlement period, namely, “to provide an incentive to settle and to make unnecessary the filing and consideration of point supplements.”¹² Each of the Settling Parties (except for Stockton) filed a point supplement notwithstanding the execution of their agreements, and because of pending court review of our NCE point system procedures, the Bureau has not yet considered the point supplements that were filed. Thus, no Commission resources have been expended on the parties’ point showings during the period between the point supplement filing deadline and the filing of the Joint Request. Finally, all but one of the Settling Parties arrived at their agreements with Delmarva by the extended point supplement deadline, and examination of the agreements among the Settling Parties and of the record herein discloses no evidence that any of the applications were filed for

⁸ See 47 C.F.R. §§ 0.61, 0.283, 73.3525(a).

⁹ 16 FCC Rcd at 5107-08. The original June 4, 2001, point supplement filing deadline was extended to July 19, 2001. See Extension Public Notice, *supra* note 7.

¹⁰ See *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”) (“[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest,” citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969) (“*WAIT Radio*”).

¹¹ See *supra* note 2.

¹² Extension Public Notice, *supra* note 7, 16 FCC Rcd at 10893.

speculative or other improper purposes.¹³ We find, therefore, that under the circumstances presented here, grant of the requested waiver of the expense reimbursement limitations of Section 73.3525(a) is in the public interest,¹⁴ and that grant of the Joint Request is in the public interest.¹⁵

9. *Stockton Petition:* Stockton, one of the Settling Parties, did not file a point supplement by the July 19, 2001, deadline, and its application was dismissed.¹⁶ According to the Joint Request, Stockton reached a settlement agreement with Delmarva on June 25, 2001. Stockton states that “absent a universal settlement in MX Group 970932, [it] had determined not to pursue its application.”¹⁷ Accordingly, Stockton further states that, “[i]n the event the Media Bureau denies or dismisses the [Joint Request], the [Stockton Petition] will be moot.”¹⁸ Stockton thus seeks reconsideration of the dismissal of its application for the limited purpose of participation in the universal settlement.

10. As noted above, we find no evidence to suggest that Stockton filed its application for any speculative or improper purpose. Moreover, Stockton reached its agreement with Delmarva well before the point supplement filing deadline. Given that we are entertaining the Joint Request, notwithstanding that it was filed well after the point supplement filing deadline, we see no reason to preclude Stockton’s participation in the universal settlement merely because it elected not to file a point supplement in reliance on ultimate grant of the Joint Request. Accordingly, we grant the Stockton Petition for the limited purpose of enabling its participation in the settlement.

11. *Main Studio Waiver:* CPBC requests waiver of the Commission’s main studio requirement in order to operate the proposed Heathsville station as a satellite of commonly owned NCE station WCVE-FM, Richmond, Virginia.¹⁹ Pursuant to Section 73.1125(a) of our rules,²⁰ a main studio must be located either (1) within a station’s principal community contour; (2) within the contour of any other broadcast station licensed to its community; or (3) within 25 miles of the center of its community.²¹ However, under Section 73.1125(b)(2), the Commission will waive these requirements where good cause exists to do so and where the proposed studio location “would be consistent with the operation of the

¹³ See, e.g., *Hoffman*, *supra* note 9, 15 FCC Rcd at 22091; *Trinity*, *supra* note 9, 14 FCC Rcd at 20522.

¹⁴ With the exception of the expense reimbursement limitations being waived herein, Settling Parties have fully complied with the remaining applicable provisions of 47 C.F.R. § 73.3525(a).

¹⁵ We also find that dismissal of the AFA, BFC, Cape, EMC, HRETA, Harris, and Stockton applications will not unduly impede achievement of a fair, efficient, and equitable distribution of radio service under 47 U.S.C. § 307(b), and accordingly will not require republication under 47 C.F.R. § 73.3525(b).

¹⁶ See *supra* note 1.

¹⁷ Stockton Petition at 2.

¹⁸ *Id.*

¹⁹ See 47 C.F.R. § 73.1125. A “satellite” station meets all of the Commission’s technical rules; however, it originates no programming and instead rebroadcasts the parent station’s programming. See *Amendment of Multiple Ownership Rules*, 3 R.R.2d 1554, 1562 (1964).

²⁰ 47 C.F.R. § 73.1125(a).

²¹ See *Review of the Commission’s Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations*, 13 FCC Rcd 15691 (1998); *recon. granted in part*, 14 FCC Rcd 11113 (1999) (“*Main Studio Reconsideration Order*”).

station in the public interest.”²² Each waiver request by an NCE station seeking to operate as the satellite of another NCE station is considered on a case-by-case basis. The Commission has recognized the benefits of centralized operations for NCE stations, given their limited funding, and thus has found good cause exists to waive the main studio location requirement where satellite operations are proposed.²³ A satellite station must demonstrate, however, that it will meet its local service obligations to satisfy the Section 73.1125 public interest standard.

12. CPBC’s request is based on the economies of scale that would be realized by grant of the waiver. We agree and conclude that there is good cause to waive Section 73.1125(a) of the rules in these circumstances. Where there is considerable distance between parent and satellite stations, we are particularly concerned that a licensee takes adequate measures to maintain awareness of the satellite station’s community needs and interests. To that end, CPBC has pledged to: (1) routinely contact Heathsville community leaders to ascertain the needs and interests of Heathsville and provide programming specifically addressing those needs and interests; (2) maintain an Internet site whereby Heathsville residents can communicate directly with the licensee concerning programming and station operation; (3) maintain a toll-free telephone line between Heathsville and WCVE-FM by which residents can contact CPBC management; and (4) maintain the proposed station’s public file in Heathsville. In these circumstances, we are persuaded that CPBC will meet its local service obligations and thus, that grant of the requested waiver is consistent with the public interest.²⁴

13. **Conclusion.** For the reasons set forth above, the Joint Request IS GRANTED, and the Stockton Petition IS GRANTED. Delmarva’s application for a new NCE FM station at Cheriton, Virginia;²⁵ CPBC’s application for a new NCE FM station at Heathsville, Virginia;²⁶ and CPBC’s application for a major modification to the facilities of WCVE-FM, Richmond, Virginia,²⁷ ARE GRANTED. The applications of AFA for a new NCE FM station at Cape Charles, Virginia;²⁸ BFC for a new NCE FM station at Cape Charles, Virginia;²⁹ Cape for a new NCE FM station at Eastville, Virginia;³⁰ HRETA for a new NCE FM station at Mathews, Virginia;³¹ EMC for a new NCE FM station at Cape Charles, Virginia;³² Harris for a new NCE FM station at Belle Haven, Virginia;³³ and Stockton for a new

²² 47 C.F.R. § 73.1125(b)(2).

²³ *Id.* See, e.g., *American Family Association*, 12 FCC Rcd 15128 (MMB 1997).

²⁴ We remind CPBC of the requirement that it maintain a public file for the Heathsville station at the main studio of parent station WCVE-FM. CPBC must also make reasonable accommodation for listeners wishing to examine the file’s contents. See *Main Studio Reconsideration Order*, 14 FCC Rcd at 11129. We further remind CPBC that, notwithstanding grant of the waiver requested here, the public file for the Heathsville station must contain the quarterly issues and programs list required by 47 C.F.R. § 73.3527(e)(8).

²⁵ File No. BPED-19980320MJ.

²⁶ File No. BPED-19980318MH.

²⁷ File No. BPED-19971202IB.

²⁸ File No. BPED-19980311MD.

²⁹ File No. BPED-19980319MF.

³⁰ File No. BPED-19980320MN.

³¹ File No. BPED-19971015MB.

³² File No. BPED-19970903MB.

NCE FM station at Cape Charles, Virginia,³⁴ ARE HEREBY DISMISSED under the terms of the Joint Request. CPBC's request for a waiver of the main studio requirement, Section 73.1125(a) of our rules, for the proposed NCE FM station at Heathsville, Virginia IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³³ File No. BPED-19980319MD.

³⁴ File No. BPED-19980320MI.